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OPTION CONTRACTS

There are various kinds of options; in all of them the option-holder has a choice, a power of electing between alternatives.¹ Usually this choice or power of electing is possessed by only one party, and for that reason the transaction is often referred to as unilateral; but it is possible for both parties to a transaction to have an option. Thus, in the case of any subsisting, unaccepted offer, not yet become a contract, an option is possessed by both parties; the offeree may accept or reject at his option; the offerer has the option of withdrawing his offer before acceptance. Such two-sided options as this will be touched upon hereafter only to distinguish them. Their full discussion would cover the formation of almost all contracts. This article will be almost wholly restricted to a discussion of so-called "binding options", or option contracts giving to one the legal right of choice, but no such right to the other.

It might be said, also, that any party to a contract has the option of performing his contract or of breaking it; but this is not a lawful option, and both law and equity will do what they can, consistently with justice, to prevent and punish his making an illegal choice. This paper will not deal with the power of doing illegal things.

Again, there are certain option contracts that are made illegal by statutes the object of which is the prevention of gambling in stocks and commodities.² These statutes do not make the exercise of his power of choice by an option-holder illegal; they forbid the making of the agreement by which one is given such a power of choice. These statutes have raised some difficult questions and have caused the courts to draw fine distinctions. These questions as to legality must also be excluded here.

¹ The word "option" is derived from "opto", to choose. The *Century Dictionary* defines it as, "(1) Choice, wish, preference, election; (2) the power or liberty of choosing, the opportunity of electing, or selecting, an alternative, or one of several lines of conduct."

² See *Century Dictionary* defining "option": "(4) On stock, or other exchanges, a privilege, secured by the payment of a certain premium, or consideration, either (1) of calling for the delivery, or (2) of making delivery, of a certain specified amount of some particular stock or produce, at a specified price, and within specified limits of time. The first kind of option is usually designated a *call*, and the second a *put*; but both are sometimes called *futures*."

There remain for discussion, then, lawful transactions between two parties where it is their intention that one of them, but not the other, shall have a lawful power of electing between alternatives affecting their legal relations with each other. Such options are of various sorts. An option may be granted in a separate and independent agreement, as where *A* pays *B* a sum of money for an option to buy property at a fixed price within a certain time. The property involved may be land, chattels, or any commodity. On the other hand, the grant of an option may be merely one term or provision in a larger agreement, as where a lessee is given the option to purchase³ or to receive an extension of the lease,⁴ or where a partnership agreement provides that the survivor shall have the option of buying the interest of the other in case of death,⁵ or where a contract of sale gives also an option on other property or gives the vendor the option to repurchase,⁶ or where a lease or a contract of employment gives one party the option of terminating it on certain terms,⁷ or where a note-holder has the option of converting it into stock.⁸

The intention of giving such an option to one of the parties may be expressed in various ways. There is no set and invariable form. It may be agreed that *A* shall have "the option to buy", or "the first refusal", or the "right of pre-emption",⁹ The

³ *McCormick v. Stephany*, 57 N. J. Eq. 257; *Dowling v. Betjemann*, 2 Johns. & Hem. 544.

⁴ *Hersey v. Giblett*, 18 Beav. 174; *Moss v. Barton*, L. R. 1 Eq. Cas. 474; *Nicholson v. Smith*, 22 Chan. D. 640.

⁵ *Dibbins v. Dibbins*, (1896) 2 Ch. 348; *Homfray v. Fothergill*, 1 Eq. 567.

⁶ *Barrel v. Sabine*, 1 Vernon 268; *Woodruff v. Woodruff*, 44 N. J. Eq. 349.

⁷ *Hanau v. Ehrlich* (1912), A. C. 39 (H. of L.); *Rust v. Conrad*, 47 Mich. 449 (lease); *Singer S. M. Co. v. Union Co.*, Holmes 253; *Pittsburg Co. v. Bailey*, 76 Kans. 42.

⁸ *Campbell v. London & B. R. Co.*, 5 Hare 519, 529. There is also another kind of option, called a contract in the alternative. Here the option is not between paying and not paying, or between doing and not doing; it is between doing one thing and doing another. See *Brantly on Cont.*, Sec. 156-160. Another sort of option contract is one whereby the owner of goods agrees to sell the same at auction to the highest bidder without reserve. *Warlow v. Harrison*, 1 E. & E. 316.

⁹ The terms of the option must not be too indefinite, or the contract cannot be enforced. *Fogg v. Price*, 145 Mass. 513 ("if the premises are for sale at any time, the lessee shall have the refusal of them." Held too indefinite to enforce.); *Potts v. Whitehead*, 20 N. J. Eq. 55; 23 N. J. Eq. 512

agreement may be under seal or not sealed, with consideration or without it, unilateral or bilateral. It may be a conditional contract to convey, or a contract to keep an offer open. The form in which such an agreement is expressed is an important matter. Courts frequently overlook this fact and lay down general rules as if they were applicable to all alike.

OPTION AGREEMENT WITHOUT CONSIDERATION.

Let us consider first an option agreement not under seal and without consideration. Such an agreement is not binding on either party and amounts to nothing more than an offer, revocable at will by the offeror.¹⁰ Such an offer may be accepted before withdrawal, however, and then becomes a contract, though not an option contract.¹¹ In *Cooke v. Oxley*,¹² the defendant agreed to sell certain hogsheads of tobacco to the plaintiff at a price named, provided the latter would give notice of acceptance by four o'clock. The plaintiff gave such notice before four o'clock, but previously thereto the defendant had sold the tobacco to another. The defendant had a right to do this, for prior to acceptance there was no consideration for this agreement. The court failed to consider the fact that there had been no formal revocation of the offer, evidently thinking that a mere change of mind by the offeror would prevent a contract from arising on acceptance. If this was sound law then, it is so no longer.

In *Great Northern R. Co. v. Witham*,¹³ the defendant agreed that the plaintiff might have, for one year, the option of buying at certain rates such quantities of specified goods as the plaintiff might choose to order. The plaintiff accepted this in writing. Such an acceptance made no contract, because the plaintiff's optional promise to order goods if it chose was no consideration.

(enforcement refused because no time was fixed during which the credit to be given was to extend); *Zimmerman v. Rhoads*, 226 Pa. 174. An option very indefinite in character was enforced in *Manchester Ship Canal Co. v. Manchester R. Co.* (1901), 2 Ch. 37. In *Hayes v. O'Brien*, 149 Ill. 403, an option to buy "at the same price per acre, as any other person or purchaser might have offered" was enforced. See also *Homfray v. Fothergill*, 1 Eq. 567.

¹⁰ *Cooke v. Oxley*, 3 T. R. 653; *Burnet v. Bisco*, 4 Johns. 235; *Reese Co. v. House*, (Cal.) 124 Pac. 442.

¹¹ *B. & M. R. Co. v. Bartlett*, 3 Cush. 224; *Nyulasy v. Rowan*, 17 Vict. L. R. 663; *Idé v. Leiser*, 10 Mont. 5.

¹² 3 T. R. 653.

¹³ L. R. 9 C. P. 16.

But when the company, prior to any revocation of the defendant, ordered a specific lot of goods, promising to pay the named prices, a contract for the sale of this specific lot was completed. Prior thereto there was no contract binding the defendant to give the plaintiff an option; there was only an offer, and both parties had an option. After acceptance by ordering specified goods, there was a binding contract to sell, and neither party had an option; the defendant was bound to deliver and the plaintiff was bound to pay.

BINDING OPTIONS.

An agreement giving an option to one of the parties is binding in case it is under seal or is based on consideration. Such an agreement may be of the following classes: I. It may be an offer of a promise for a promise (a bilateral contract), accompanied by a contract not to withdraw the offer. This accompanying contract must either be under seal or be based on consideration; it is generally unilateral, being under seal or the consideration having been paid. II. It may be an offer of a promise for an act (a unilateral contract), accompanied by a contract to hold the offer open as in the preceding case. III. It may be a unilateral contract with an express condition precedent.

Often it will be difficult to determine to which of the three classes an option contract belongs, because generally the parties do not stop to analyze their own intentions and do not express their agreement in unequivocal words. In such cases the courts must do as they do in the construction of statutes,—give the words the meaning that seems just and reasonable, the meaning that the parties possibly would have expressed if they had thought about it. The fact is, however, that the courts often do in this matter just what the contracting parties did; they determine the obligations of the parties without analyzing the agreement any more carefully than did the parties.¹⁴ In general, this results in

¹⁴ There is a strong tendency on the part of courts and writers to classify and define all options as falling under class I, whereas probably most options belong to class III. "An option is an unaccepted offer"; *McMillan v. Phila. Co.*, 159 Pa. 142. "An option is not an actual or existing contract, but is a right reserved in a subsisting agreement. In a certain sense an option is a mere sollicitation, a promise without mutuality, not yet ripened into a perfect agreement." *Rivers v. Oak Lawn S. Co.*, 52 La. Ann. 762. "A contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price within

justice; but to arrive at justice in that way is a confession that law is based upon morality and instinct, and not upon logic and reasoned principles. There need be no hesitation in confessing such a truth; but at the same time logical analysis is useful and may possibly arrive at a reasoned principle capable of practical application for a long time.

There is no doubt that to whichever of the three above classes an option contract belongs, it is binding on the option-giver, and for breach of it the option-holder can maintain an action for damages. It is generally held also that the option contract will be specifically enforced in equity if the remedy at law is inadequate; but there is some conflict. Let us consider each class separately.

I. OFFER TO MAKE A BILATERAL CONTRACT.

(a) Option Contract Under Seal.

Suppose the following case: *A* offers a promise to sell his land to *B* for a return promise to pay \$1,000, acceptance to be within thirty days, and promises under seal not to withdraw the offer for that time. This amounts to two things; an offer to make a bilateral contract in the future, and a completed unilateral contract. The unilateral contract not to withdraw the offer is valid and binding, and for its breach an action for damages will lie.¹⁵ If it remains unbroken, and the offer to sell is accepted by *B* within the time limited, there arises a bilateral contract to sell and to buy, enforceable both at law and in equity. The obligation of this contract and the remedy thereon are both mutual, and there is not the least justification for those few cases refusing specific performance for lack of mutuality.¹⁶

But suppose that *A* attempts to break his contract to leave the offer open, and notifies *B* that the offer is withdrawn. Can *B*

a certain time. He does not sell the land; he does not agree to sell it, but he does sell something; that is, the right or privilege to buy at the election of the other party;" *Ide v. Leiser*, 10 Mont. 5. See also *Sizer v. Clark*, 116 Wisc. 534; *Johnston v. Trippe*, 33 Fed. 530; *Myers v. Stone*, 128 Ia. 10; *Clark on Cont.*, Sec. 22; 18 Harv. L. R. 457. When the parties call the option contract a "refusal", it looks as if they regarded it as an offer with a promise not to withdraw. It is so regarded by the court in *Potts v. Whitehead*, 20 N. J. Eq. 55.

¹⁵ *Warlow v. Harrison*, 1 E. & E. 316. A contract whereby one binds himself to accept an offer is the same in character as one by which he binds himself not to withdraw an offer.

¹⁶ *Litz v. Goosling*, 93 Ky. 185; 21 L. R. A. 127.

later, but within the thirty days, accept the offer to sell, complete the bilateral contract, and maintain an action at law for breach of this latter contract to sell or a suit in equity for specific performance? It is generally held that he can do both. Such a ruling involves two difficulties. First, *A* has withdrawn his offer and is no longer minded to sell, as *B* knows. Can a man be forced into a contract against his will? In such a case there is no meeting of the minds. Admitting that *A* contracted to keep his offer open and to remain of a mind to sell, the fact is that he did not do so. It is hardly correct to say that he could not break that contract, for the fact is that he has broken it. Nor can he be prevented from doing so, for he has control of his own mind in spite of jails and punishments and of all that judges and chancellors can do. If the foregoing be true, there is no contract for the sale of the land for either law or equity to enforce.¹⁷ In *Mier v. Hadden*,¹⁸ Ostrander, J., says: "While it may seem at first blush a legal paradox that a contract for the sale of land, mutual and enforceable, can be made when at the time it is claimed to have been made one party to it is openly protesting that he will make no such contract, and while reasons may be advanced to support the proposition that the option holder should be in such a case remitted to an action for damages for refusal to hold the offer open for the stipulated time, there is reason and precedent for holding that the offer to sell, if paid for, may not be withdrawn during the stipulated time, being in law a continuing offer to sell." If *A* is to be forced to convey against his will or to pay damages for non-conveyance, it is because the law is creating an obligation, quasi-contractual in character, based neither on present consent nor upon unjust enrichment. Such an obligation well deserves the name quasi-contract, because it is precisely like the obligation that the offeror was previously willing to assume, and not only does the court pretend that it is a real contract, but it enforces it *exactly* as if it were one. In this it differs from other so-called quasi-contracts. As to them, the remedy is in debt or indebitatus assumpsit for an amount measured by the defendant's unjust enrichment; while in the case under discussion the remedy is in express assumpsit for an

¹⁷ See, taking this view, note, 21 L. R. A. 130. *Hanley v. Watterson*, 39 W. Va. 214; *Rease v. Kittle*, (W. Va.) 49 S. E. 150; *Newton v. Newton*, 11 R. I. 390.

¹⁸ 148 Mich. 488.

amount measured by the extent of the plaintiff's disappointment as in the case of real agreements. In a case like this, both law and equity say to the defendant, as equity often says in other cases, You ought to have kept your offer open; we shall treat that as done which ought to have been done, and hold you as if it had been done. But this is quasi-contract, not contract; it is an obligation based upon righteousness, not upon consent. There is no real objection to creating such an obligation, but only the superficial one that some thousands of judges have said that they cannot make contracts for parties.

The second difficulty, referred to above, exists only in equity where a bill is brought for specific performance. It is generally held that equity will not decree specific performance of a contract without consideration even though it is under seal. In the foregoing case, the creation of an obligation to convey the land is the specific enforcement of the promise of *A* to hold his offer open for thirty days. But there was no consideration for this promise. A similar difficulty exists if we regard the obligation as quasi-contractual, although quasi-contract does not purport to be based upon consideration. The obligation of quasi-contract is based upon equity and good conscience, and in general these are held to give rise to an obligation only where there is an unjust enrichment. In the present case there has been no such enrichment; nothing whatever has been added to *A*'s wealth and nothing whatever has been subtracted from *B*'s. For the same reason the obligation of *A* to convey cannot be said to rest upon the doctrine of estoppel, for there has been no representation of fact by *A*, nor has *B* in any respect changed his position. His mere acceptance cannot in itself be regarded as a material change of position; and if, since acceptance, such a change has taken place, it has been with full knowledge of *A*'s previous revocation.

Thus it appears that in cases where *A*'s offer has been revoked prior to acceptance, his obligation to convey, subsequently arising from such acceptance, can hardly be based upon recognized principles of contract or of quasi-contract, either legal or equitable, and it can be specifically enforced only by disregarding another generally recognized principle. Nevertheless, it has been specifically enforced,¹⁹ and damages are collectible at law.

¹⁹ *O'Brien v. Boland*, 166 Mass. 481; *Cummins v. Beavers*, 103 Va. 230; *Watkins v. Robertson*, 105 Va. 269 (cf. *Graybill v. Brugh*, 89 Va. 895).

(b) Option Contract Based on Consideration.

Suppose the following case: *A* offers a promise to sell his land to *B* for a promise to pay \$1,000, acceptance to be within thirty days; and promises for \$10 paid by *B* not to withdraw the offer for that time. This case is just like the one preceding, except that a consideration of \$10 is substituted for a seal. Just as before, this transaction consists of an offer to make a bilateral contract to sell and to buy, with a unilateral contract to hold the offer open for thirty days. Just as before, acceptance by *B* before revocation of the offer completes a bilateral contract for the sale of the land, enforceable both at law and in equity against both parties. In case *A* revokes before acceptance, the same problems arise as in case of the offer under seal, with two differences. As before, there is no meeting of the minds, and hence no real agreement to convey. But there is a small enrichment of *A*, which may be made the basis of a quasi-contract. *B* paid *A* \$10 for a promise, and the promise has been broken. In such cases *B* has a right to sue for damages, or he may sue in quasi-contract for restitution. In the latter case his recovery would be limited to the amount received by *A*, his unjust enrichment. But this is far from being the same as an obligation to convey the land. The consideration of \$10 also relieves equity of the difficulty involved in specifically enforcing a sealed promise without consideration.

Mutuality.

The two foregoing cases are alike in their lack of *mutuality of agreement* at the moment of acceptance. They are alike also in the matter of mutuality of obligation. Prior to acceptance by

Contra, Davis v. Petty, 147 Mo. 383; *Corbett v. Cronkhite*, 239 Ill. 9 (three judges dissenting).

The case of *Warlow v. Harrison*, 1 E. & E. 316, also appears to be *contra* in principle. An owner of a horse contracted with all comers to sell it at auction to the highest bidder without reserve. Plaintiff was the highest bidder but defendant refused to accept the bid. It was held that there was no contract of sale upon which the plaintiff could sue, but that he must sue, if at all, for breach of the preliminary contract not to withdraw the horse from sale. The measure of damages in the two actions would no doubt be identical.

A sealed option, without consideration, should always be specifically enforced, if the option holder has performed an onerous condition in reliance upon it. Such performance may not be technical consideration, but it is sufficient basis for an equitable estoppel. See *Wilks v. Ga. Pac. R. R.*, 79 Ala. 180.

B, the contract was unilateral, and *A* alone was under an obligation. *B* had an option. This lack of mutuality of obligation is no objection to the enforcement of *A*'s contract, either at law or in equity. The doctrine that equity will not enforce specific performance against *A* unless the same remedy is available against *B* was exploded by Mr. Ames²⁰ and others, and was in fact never followed generally by the courts. A unilateral contract to convey land, for an executed consideration, has always been enforced specifically.²¹ This remedy should never be refused, on the ground of want of mutuality, in case the contract is unilateral, as is the case with the preliminary option contract above. A promise under seal to convey land may not be specifically enforceable, but this is for lack of consideration, and not for want of mutuality. A promissory note to repay money borrowed will not be specifically enforced in equity, but this is because it is specifically enforceable at law in debt or its equivalent, not for want of mutuality. If a promisee has performed his own part of the contract and his remedy at law is not adequate, he may be sure of getting a decree for specific performance.

So, if *A*'s promise to hold the offer open was given for \$10 paid, the fact that *B* was not bound to do anything more, unless he later makes a new promise, is no objection to a decree for specific performance of *A*'s promise. Equity must still wrestle with the problem of whether it is possible for a court to prevent a man from changing his mind, and to compel him to keep his offer open; but this is very different from the question of mutuality of remedy. If it is possible for equity to keep *A*'s offer open, and if it was open when *B* accepted, there arises a new bilateral contract to sell and to buy, specifically enforceable against both, and mutuality of remedy exists.²²

²⁰ 3 Col. L. Rev. 1; Lectures on Leg. Hist., 370.

²¹ Ames, 3 Col. L. R., 1; *Howe v. Watson*, (Mass.) 60 N. E. 415; 1 Ames Cases Eq. 429, and cases cited in Note 3. *Anderson v. Anderson*, 251 Ill. 415. The statement *contra*, in *Bispham on Equity*, in Sec. 377, must be due to a misunderstanding of unilateral contracts.

²² It is often said that by bringing suit for specific performance, the plaintiff subjects himself to the jurisdiction of equity and thus makes the remedy mutual. See *Richards v. Green*, 23 N. J. Eq. 536; *Woodruff v. Woodruff*, 44 N. J. Eq. 439. This is equivalent to saying that mutuality of remedy, existing prior to the bringing of a suit, is unnecessary.

II. OFFER TO MAKE A UNILATERAL CONTRACT.

Suppose the following case: *A* offers to sell certain land to *B* for \$1,000, to be paid within thirty days, and promises for a consideration, or under seal, not to withdraw the offer for thirty days. This is an offer of a promise for an act, accompanied by a unilateral contract to hold the offer open. The only difference between this kind of an option and that contained above in I, is in the mode of acceptance and in the consequent situation of *B*. Here a mere notice of acceptance with a promise to pay the \$1,000 would be of no effect. In this case acceptance must consist of payment. A mere promise to pay would not bind *A* to convey, for *A* prescribed a different mode of acceptance. It follows from this, that such a promise to pay does not bind *B* either. There is no consideration for it. But if *B* accepts *A*'s offer as prescribed, and actually pays the money to *A* prior to any revocation of *A*'s offer, *A* becomes bound by his promise to sell, both at law and in equity. In case *A* has revoked his offer prior to payment by *B*, the very same problems arise as in class I. *B* can undoubtedly sue for breach of *A*'s promise not to revoke; and if *B* can succeed in accepting by doing the act requested after such revocation, no doubt the courts would hold that *A* is now bound by a contract to convey, enforceable both at law and in equity. The problems of mutuality of agreement, mutuality of remedy, consideration, and measure of damages, would be the same, and should be solved in the same way as in class I.

III. OPTION REGARDED AS A CONDITIONAL CONTRACT.

(a) Where the Condition is the Making of Payment.

The preceding discussion has dealt with options as consisting of an offer and of an independent contract not to withdraw the offer. But in fact an option may be nothing of the sort, and options are not generally so worded as to express such a meaning. Suppose the following: *A* agrees to sell certain land to *B* for \$1,000 if paid within thirty days, and in return *B* pays \$10 in cash. This is a unilateral contract to sell on condition. There is no offer to be accepted and none that can be revoked. Subsequent payment by *B* is not an acceptance of an offer; it is the fulfilment of a condition precedent to *A*'s liability on his previous contract. *B* is not bound to fulfil the condition, but if he does not fulfil it, he cannot sue for damages, for the land, or for his \$10. If *A* prevents *B* from fulfilling the condition, it would be held to

amount to a waiver of the condition, and *B* could maintain suit by merely keeping his tender good.²³ The performance by *B* of the condition, that is, the payment of the \$1,000, is not the consideration for *A*'s promise to convey. The consideration for that promise was \$10 paid. This consideration is amply sufficient at law, in equity, and in the market place, for the conditional promise of *A* to convey, burdened as it was by the condition of payment of \$1,000 within thirty days.

No question can arise here as to mutual assent. Upon payment of the \$10 by *B*, the parties are agreed. *A* promises and *B* pays. That completes the contract, and the obligation of *A* attaches at once, although it is a conditional obligation. On fulfilment of the condition, *B* is entitled to a conveyance, and on *A*'s refusal to convey, *B* can sue for damages at law, or for the return of his \$10 in quasi-contract, or for specific performance in equity.²⁴

The contract in this case is unilateral, nor can it ever become bilateral.²⁵ Suppose *B* should notify *A* that he accepted and should promise to pay the \$1,000 within the thirty-day period. This would not alter *A*'s obligation in the least and it would be the fulfilment of no condition. Nor would it put any obligation on *B*. *B*'s new promise to pay the \$1,000 has no consideration whatever; *A* does nothing in return for it. What *A* has done in the past is no consideration. True, *A* obligated himself in the past at *B*'s request, but from that request there arose neither a moral nor a legal obligation on *B*'s part. He paid \$10 for what *A* did at his request, and that is regarded by the law and by morality, just as it was regarded by the parties themselves, as the exact equivalent of *A*'s undertaking.

There are, however, many cases holding *B* bound by his later promise to pay the \$1,000.²⁶ These cases generally go upon the theory that the option was like that stated under heading I above, that it consisted of an offer to make a bilateral contract and an independent unilateral contract not to withdraw the offer. If it was the intention of the parties to make such a bilateral contract, no exception can be taken to the decisions except as already dis-

²³ *Rockland-R. Lime Co. v. Leary*, 203 N. Y. 469.

²⁴ *Wilks v. Ga. Pac. R. R.*, 79 Ala. 180 (semble).

²⁵ *Brantly on Cont.*, Sec. 146, treats the contract as a bilateral one, after acceptance, although he regards the original contract as a unilateral one, and not as an offer. This appears to be an inconsistent position.

²⁶ See below, Note 36.

cussed under heading I. If, however, the correct analysis of the facts in such cases shows that the transaction was a unilateral contract to convey, conditional upon the actual making of the payment, the decisions cannot be supported. There is, however, another possible analysis of the facts, and one that may support the decisions. It will be explained under the heading that follows.

(b) Where the Condition is the Making of a Promise.

In the foregoing case the condition of the vendor's promise to convey was actual payment by the vendee. But the condition may be the making of a promise instead of being payment or the performance of some other kind of act. Suppose the following case: In consideration of \$10 paid by *B*, I promise to convey Blackacre to *B* on condition that he will promise, within thirty days, to pay \$1,000 for the conveyance. (Signed) *A*. Here *A* makes a unilateral contract, binding him at once, and not binding *B* at all, but his obligation is conditional upon *B*'s making a promise to pay. This promise must be made within thirty days, to fulfil the condition. It is not a promise to pay within thirty days. Inasmuch as *A* does not fix a time for either conveyance or payment, no doubt by implication of law, they are to be contemporaneous acts. *B* could not maintain suit on *A*'s promise to convey without having performed two conditions precedent, one, an express condition—the making of a promise within thirty days; the other, implied by law and founded in equity and good conscience—a tender of \$1,000 within a reasonable time.

Suppose that *B* within the thirty days makes the requested promise to pay \$1,000 to *A*. Is this a binding promise? There is no doubt that if it is held to be binding on *B*, it will also be held, by implication of law, to be conditional upon tender of conveyance by *A*. But how can *B*'s promise be regarded as binding? What is the consideration for it? *A*'s promise to convey was not the consideration, for that promise was made in return for the executed consideration of \$10, its full and complete equivalent both in law and in morals.²⁷ The legal obligation of that promise attached when it was made. But when *B* fulfils the express condition and makes his promise to pay, there is a change in the character of *A*'s legal obligation. Prior thereto *A*'s obligation

²⁷ An option is not unconscionable merely because the consideration was only \$1. *Mier v. Hadden*, 148 Mich. 488; *Cummins v. Beavers*, 103 Va. 230; but cf. *Murphy v. Reid*, 125 Ky. 585.

was subject to two conditions precedent. Subsequent thereto *A*'s obligation is subject to only one condition precedent, the one implied by law. This change in the character of his obligation is a detriment to him, one that he suffers and that the parties contemplated that he should suffer, in return for *B*'s promise. This change is contemporaneous with the making of *B*'s promise, and hence cannot be said to be past consideration. It is true that *A* has performed no new act or forbearance. The change in the character of his obligation is caused wholly by *B*'s new act, the act of promising \$1,000. Probably *A* cannot in any way prevent this change in his legal obligation. But all this is immaterial. It makes no difference what is the immediate cause of the change. The material fact is, that there is such a change, that it is a legal detriment to *A*, and that it is contemplated by the parties as the equivalent of *B*'s promise to pay.

The change in the character of *A*'s obligation is the consideration for *B*'s new promise to pay, but it does not follow from this that *B*'s new promise is a part of the consideration for *A*'s obligation. The consideration for *A*'s obligation remains exactly what it was, namely, \$10 in hand paid. Whenever one makes a conditional promise in return for a particular consideration, the fulfilment of the condition works an important change in the promisor's situation, but it is not the making of a new contract or the giving of a new consideration for the promise. And so, upon the fulfilment of the condition, the unilateral contract binding *A* to convey is still a unilateral contract binding *A*, and its consideration is the very same consideration that existed from the first. It is enforceable at law and in equity just as it was from the first. It never was an unaccepted offer, and it is not now a newly accepted one. The only difference in it is, that one step has been taken toward full performance. It is no longer conditional, because the condition has been fulfilled. It formerly contained an option, whereas it now contains none, because the option has been exercised, and the choice made.

The new promise of *B* to pay \$1,000 is a new and separate contract between the parties. It, too, is unilateral, a new obligation to pay \$1,000 resting upon *B*, with no new obligation upon *A*. The consideration for *B*'s new promise is fully performed and consists of the very material change in the legal situation of *A*. *B*'s new promise is enforceable at law and in equity just as other

unilateral contracts are enforceable. Thus decisions enforcing *B*'s promise may be justified.

If we accept the foregoing analysis, what would be the effect of a notice of revocation given by *A* to *B* before *B* had fulfilled the condition by making his new promise to pay \$1,000? It takes two to make a contract, even a unilateral one. Perhaps, therefore, *B*'s new promise made after *A*'s revocation should be held to be not binding upon him. But even if so, this should not affect the previous obligation of *A* to convey. The previous contract gave *B* a choice. This he can make without any assent on *A*'s part, for it takes only one to make a choice, or to exercise an option. Hence it would seem, that when *B* makes his new promise to pay \$1,000, he fulfils the condition precedent to *A*'s liability on his promise to convey, and he has an immediate right to enforce *A*'s promise at law and in equity, whether he himself can be sued by *A* or not. Even if we should assume that the condition precedent to *A*'s liability is the making of a *binding* promise by *B*, if *A* himself prevents the fulfilment of the condition, he cannot equitably take advantage of it, and *B*'s suit against *A* for conveyance or for damages will lie just as if the condition had been waived.²⁸

If *B*'s new promise is a new and separate unilateral contract, should it not follow that *B* can enforce *A*'s previous contract to convey without himself tendering payment? And cannot *A* maintain suit on *B*'s promise for the \$1,000 without himself tendering a conveyance? Are not the two contracts entirely independent and unconditional? Undoubtedly it would have been so held in former times,²⁹ but it can be asserted with confidence that it would not now be so held. It is true that as far as the express words are concerned, both promises are unconditional, but the courts know how to import conditions into contracts on purely equitable grounds for the sake of justice. Or, to express it in other words, they know how to create an equitable defence to an action upon an entirely unconditional promise. This "imported condition", or "equitable defence", is found by the courts entirely outside of the terms of the contract sued upon, and frequently outside of the unexpressed intentions of the parties, and there is no impropriety in finding it in the terms of a separate contract.

²⁸ *Ripley v. McClure*, 4 Ex. 345; *United States v. Peck*, 102 U. S. 64; *Rockland-R. Lime Co. v. Leary*, 203 N. Y. 469; *Brantly on Cont.*, Sec. 141; *Dig. of Just.*, 45, 1, 85, 7.

²⁹ See *Pordage v. Cole*, 1 Wms. Saunders, 319.

The court will imply such a condition, or create such a defence, in case the promisor has not received, and is not going to receive, the substantial value that he rightly expected in exchange. Now, in the case before us, if the promise of *B* to pay \$1,000 is in fact a separate unilateral contract, it is clear that *A* and *B* did not make an exchange of promises, the obligation of the one was not the consideration for the obligation of the other. But it is not clear that they did not contemplate an exchange of performances. In fact, it is certain that the parties contemplated the land and the \$1,000 as substantial equivalents, and it is not just that either party should have both land and money at the same time, and, hence, if either should sue the other, without first making a tender of performance, he would be met by a perfect equitable defence.

(*c*) Where the Condition is the Giving of Notice.

This is strictly not a separate class, all such cases falling under headings (*a*) and (*b*). Suppose the following case: In consideration of \$10 paid by *B*, I promise to convey Blackacre to *B* for \$1,000, provided *B* shall give notice of his election by May 1st. (Signed) *A*. This is one of the commonest forms of an option contract.³⁰ It is a unilateral contract to convey, with one express condition. If *B* gives notice prior to May 1st, that he elects to buy, he becomes entitled to enforce *A*'s promise at law and in equity, if within a reasonable time he tenders payment of \$1,000. Such tender would be a condition precedent by implication of law. It should not be held, however, that *B* is bound to pay the \$1,000. He has made no promise and has been asked to make none. Yet it is frequently held, that the giving of notice is by implication the making of a promise to pay, with results similar to those explained under heading (*b*) above. Of course, by "notice" the parties may mean "notice of a promise".³¹

SPECIFIC PERFORMANCE OF OPTION CONTRACTS.

It is believed that the foregoing analysis presents means of determining the correctness of decisions upon option contracts.

³⁰ See *Moss v. Barton*, L. R. 1 Eq. Cases, 474; *Buckland v. Papillon*, L. R. 2 Ch. App. 67.

³¹ The option holder was held bound as by a promise, after he had given notice of acceptance, in the following cases: *Friary Breweries v. Singleton*, (1899) 1 Ch. 86; 2 Ch. 261; *Castle Creek W. Co. v. Aspen*, 146 Fed. 8; *Woods v. Hyde*, 6 L. T. 317. See *contra*, *Ranelagh v. Melton*, 2 Dr. & Sm. 278 (semble).

There is some inconsistency and conflict in the reported cases, but no more than in other branches of the law. It will be found that the decisions themselves are less in conflict with each other than are the reasons given for the decisions. Such conflict as exists may be said to be due chiefly to three things: (1) a failure to distinguish between consideration for a promise and a condition of the promisor's liability; (2) a failure to understand the differences between unilateral and bilateral contracts; (3) and most important of all, a failure to observe that option contracts are capable of just as great differences in character as are other contracts. Each of these three things necessarily involves the other two.

(a) Enforcement Against Option Giver.

It is universally held, that where the so-called acceptance by the option holder is given before revocation by the option giver, a valid contract arises, specifically enforceable in equity, in those cases where the legal remedies are deemed inadequate.³² This is true irrespective of the class to which the option contract belongs, whether I, II, or III herein.

It is almost as universally held that the option giver's promise may be accepted and become enforceable both at law and in equity, even though before any so-called acceptance by the option holder one of those events occurs that are legally sufficient to revoke an offer. For example, the death of the option giver before notice of acceptance does not prevent equity from decreeing specific

³² *Green v. Low*, 2 Jur. N. S. 848; *Pegg v. Wisden*, 16 Beav. 239; *Moss v. Barton*, L. R. 1 Eq. Cas. 474; *Buckland v. Papillon*, L. R. 1 Eq. Cas. 477; *Nicholson v. Smith*, 22 Ch. 460; *Wilks v. Ga. Pac. R. Co.*, 79 Ala. 180; *Byers v. Denver C. R. Co.*, 13 Col. 552; *Rockland-R. Lime Co. v. Leary*, 203 N. Y. 469; *Hoogendorn v. Daniel*, 178 Fed. 765; *Frank v. Schnuettgen*, 187 Fed. 515; *Hawralty v. Warren*, 18 N. J. Eq. 124; *Green v. Richards*, 23 N. J. Eq. 33, 536; *Herman v. Babcock*, 103 Ind. 461; *Carter v. Love*, 206 Ill. 310; *Seyferth v. Groves & S. R. Co.*, 217 Ill. 483. *Contra*, *Litz v. Goosling*, 93 Ky. 185; 21 L. R. A. 127. Thus an option to renew a lease will be specifically enforced in equity in favor of the lessee. *McCormick v. Stephany*, 57 N. J. Eq. 257; 1 Ames Cases Eq. 431, and note collecting cases.

But the option holder may lose his right to specific performance by laches; *Mills v. Haywood*, 6 Ch. Div. 196; and equity may refuse a remedy on the grounds of hardship and unfairness, *Talbot v. Ford*, 13 Sim. 173.

performance.³³ These cases are certainly sound, if the contract falls within class III, as most options probably do; but they are more doubtful, though not entirely indefensible, if they fall within classes I and II. In like manner, the holder may enforce the contract even though his acceptance is subsequent to a notice of revocation and a sale to some third person who had notice of the option.³⁴ Of course, all conditions precedent must be fulfilled.³⁵

(b) Enforcement Against Option Holder.

A notice of acceptance by the option holder is almost always held to create a bilateral contract, and suit both at law and in equity is held to lie in favor of the option giver.³⁶ These decisions are sound only in case the particular contract falls within class I or class III (b), and are incorrect if it falls in class II or class III (a). Very likely it is true that parties who make option contracts usually contemplate bilateral obligations, thus justifying most decisions of the sort. In *Woods v. Hyde*,³⁷ a lease contained an agreement that if the lessee should desire to purchase at £25,000 and should give notice in writing by a certain time, he "should be entitled to become the purchaser of such premises at the price"; and if the lessee, within three months after notice, should pay or tender the £25,000, the lessor would convey. The

³³ *Woods v. Hyde*, 6 L. T. 317; *Hall v. Bushnell*, 14 L. T. 246; *Moss v. Barton*, L. R. 1 Eq. Cas. 474; *Nicholson v. Smith*, 22 Ch. D. 640; *In re Adams & K. Vestry*, 27 Ch. D. 394 (semble); *Douglas v. Whitmore*, stated in *Ripley v. Waterworth*, 7 Ves. Jr. 436; *Maughlin v. Perry*, 35 Md. 352; *Rockland-R. Lime Co. v. Leary*, 203 N. Y. 469; *Adams v. Peabody Coal Co.*, 230 Ill. 469; *In re Hunter*, 1 Edw. 1; *Longworth v. Mitchell*, 26 Ohio St. 334; *Brantly, Contr.*, Sec. 146. See *contra*, *Newton v. Newton*, 11 R. I. 390, carrying out logically the idea that an option is an offer.

³⁴ *Maughlin v. Perry*, 35 Md. 352; *Ross v. Parks*, 93 Ala. 153; *Adams v. Peabody Coal Co.*, 230 Ill. 469; *Myer v. Hadden*, 148 Mich. 488; 12 Ann. Cas. 88, and note; *Stitt v. Huidekopers*, 17 Wall. 384; *Johnston v. Trippe*, 33 Fed. 530; *Brantly on Contr.*, Sec. 146.

³⁵ *Woodruff v. Woodruff*, 44 N. J. Eq., 349; and see below, "Time of the Essence."

³⁶ *Smith v. Baugham*, 156 Cal. 359 (semble); *Watford Oil Co. v. Shipman*, 233 Ill. 9 (semble); *Johnston v. Trippe*, 33 Fed. 530 (semble); *Friary Breweries v. Singleton*, (1899) 1 Ch. 86; 2 Ch. 261; *Castle Creek W. Co. v. Aspen*, 146 Fed. 8; see 8 Ann. Cases, 660; *Mills v. Haywood*, 6 Ch. D. 196 (semble); *Linn v. McLean*, 80 Ala. 360 (semble); *Perry v. Paschal*, 103 Ga. 134; *Guyer v. Warren*, 175 Ill. 328; Fry S. P., Sec. 465.

³⁷ 6 L. T. 317.

court (Wood, V. C.) overruled a demurrer to a bill for specific performance by the heir of the option giver against the option holder, and said, "Contract complete from the moment that the defendants had given the notice. That having given that notice, they could not withdraw from the purchase." But in a case exactly like this, Kindersley, V. C., thought the contrary, and said that the vendor could not compel the vendee to pay even though the latter had given the required three months notice of acceptance. He says, "could the owner at any time say to the lessees, 'you have given me this notice of your desire, and now I will file a bill to compel you to complete', although the lessees, until they have paid the money have never performed the condition; and they might say, 'we do not mean to perform it'? Could he apply to compel them? Impossible."³⁸

ASSIGNMENT OF OPTION CONTRACTS.

It may be laid down as a general principle, with exceptions as below, that an option contract is binding upon the assigns and successors of the option giver and that it is enforceable by the assigns of the option holder. This shows that in fact most option contracts must belong to class III, that they are contracts to convey on condition, and not mere offers with a promise to hold the offers open. An offer made to a specific person cannot be accepted by anybody else, and the offeree has nothing to assign. It has, in fact been held that an option contract is not assignable.³⁹ There is, however, overwhelming authority to show that the assignee of the option holder may enforce the contract.⁴⁰ So, the contract will be enforced in favor of the administrator of a lessee who had an option to buy;⁴¹ of the heir of such a lessee;⁴² of the option holder's committee in lunacy;⁴³ of equitable assignees where no legal transfer has been made;⁴⁴ and of assignees in

³⁸ *Ranelagh v. Melton*, 2 Dr. & Sm. 278; 10 Jur. N. S., 1141.

³⁹ *Rease v. Kittle*, (W. Va.) 49 S. E. 150.

⁴⁰ *Wilks v. Ga. Pac. R. R.*, 79 Ala. 180 (semble); *Cummins v. Beavers*, 103 Va. 230; *Perry v. Paschal*, 103 Ga. 134; *Douglas v. Whitmore*, stated in *Ripley v. Waterworth*, 7 Ves. Jr. 456; *House v. Jackson*, 24 Ore. 89.

⁴¹ *In re Adams & K. Vestry*, 27 Ch. D. 394.

⁴² *Ankeny v. Richardson*, 187 Fed. 550; this is probably unsound, for the benefit of the option contract is generally held to be personal property and to belong to the executor for the benefit of the next of kin. See below, Notes 56 and 57.

⁴³ *Dibbins v. Dibbins*, (1896) 2 Ch. 348 (semble).

⁴⁴ *Friary Breweries v. Singleton*, (1899) 1 Ch. 86; 2 Ch. 261.

bankruptcy.⁴⁵ The option contract may be made to the option holder and assigns;⁴⁶ or it may be made expressly non-assignable.⁴⁷ Of course, the option holder cannot substitute some other's responsibility and credit for his own; the assignee has no remedy until he sees that all conditions precedent are fulfilled.

A grantee from the option giver may always retain the property if he is a purchaser for value without notice. This is because the grantee gets legal title and has equal equity. A grantee from the option giver may retain the property even though he had notice and gave no value, in case the option was not a contract but was a mere offer and had not been accepted prior to conveyance.⁴⁸ and perhaps also in case the option was a contract under seal but without consideration.⁴⁹ In the latter case, the option holder would have no remedy at law against the grantee because of lack of privity, and he would have no remedy in equity against the grantee because he has given no consideration.

A grantee from the option giver may never retain the property as against an option holder who has given consideration for his option, in case such grantee had notice of the option.⁵⁰ And the same is true where the option was a mere offer, if the offer was properly accepted and the grantee had notice thereof before his own right accrued.⁵¹ The heir or devisee of the option giver will take subject to the rights of the option holder, and the latter may obtain a decree for specific performance against him.⁵²

⁴⁵ *Buckland v. Papillon*, L. R. 1 Eq. Cas. 477; 2 Ch. App. 67; assignable even though assigns were not mentioned in the option.

⁴⁶ *Maughlin v. Perry*, 35 Md. 352; *Pearson v. Millard*, 150 N. C. 303.

⁴⁷ *Behrens v. Cloudy*, 50 Wash. 400; *Myers v. Stone*, 128 Ia. 10.

⁴⁸ As in *Cooke v. Oxley*, 3 T. R. 653; *Dickinson v. Dodds*, 2 Ch. D. 463; *Peacock v. Deweese*, 73 Ga. 570.

⁴⁹ *Graybill v. Brugh*, 89 Va. 895; but see note 19 above.

⁵⁰ *Mills v. Haywood*, 6 Ch. D. 196 (semble); *Manchester Ship Canal Co. v. Manchester R. Co.* (1901), 2 Ch. 37 (semble); *Hersey v. Giblett*, 18 Beav. 174; *Hayes v. O'Brien*, 149 Ill. 403; *Ross v. Parks*, 93 Ala. 153; *Birmingham Canal Co. v. Cartwright*, 11 Ch. D. 421. This is not because the option holder has an interest in the land, but because there is an implied negative covenant binding the option giver not to sell to others.

⁵¹ *Mansfield v. Hodgdon*, 147 Mass. 304.

⁵² *Lawes v. Bennett*, 1 Cox 167; *Townley v. Bedwell*, 14 Ves. 591; *Nicholson v. Smith*, 22 Ch. D. 640; *Rockland-R. Lime Co. v. Leary*, 203 N. Y. 469; *Birmingham Canal Co. v. Cartwright*, 11 Ch. D. 421 (devisee).

CHARACTER OF OPTION HOLDER'S INTEREST.

There are many dicta to the effect that an option holder has no estate or interest in the land on which he has an option.⁵³ This is correct in case the option is to be regarded as a mere offer to sell. But where the option is in fact a conditional contract to convey, the option holder should be held to have an interest in the land, within the meaning of the statute of frauds, just as it is held in the case of those who hold a contract right of purchase, but with no option.⁵⁴ In fact it is not unusual for the option holder's right to be called an equitable interest.⁵⁵

It has also been held that on the death of the option holder, before notice of acceptance, the right passes, not to the heir, but to the personal representative.⁵⁶ This seems to be a sound ruling, because the option holder had not bound himself to buy, and his heir or devisee should not be permitted to take funds from the personal estate and use them to buy land for his own benefit, when the option holder had never indicated an intention to do so himself.⁵⁷ The option holder had the right to do so, but he was not bound to do so. The possession of such a right does not operate as an equitable conversion of the amount of the price to be paid, so that it should thereafter be regarded as dedicated to the use of the heir. In this respect there is a great difference between the position of the option giver and the option holder. Where there has been made a valid bilateral contract to convey land for a price, the vendor is held to have worked an equitable conversion of the land into personalty, and in case of death before conveyance, the vendor's executor can enforce the contract for the benefit of the

⁵³ *Idc v. Leiser*, 10 Mont. 5; *Myers v. Stone*, 128 Ia. 10; *Bostwick v. Hess*, 80 Ill. 138; *Manchester Ship Canal Co. v. Manchester R. Co.*, (1901) 2 Ch. 37. But held in *Buckland v. Papillon*, L. R. 2 Ch. App. 67, that an option for a lease was an interest in the land within the meaning of the Bankruptcy Act.

⁵⁴ See *Dougherty v. Catlett*, 129 Ill. 431.

⁵⁵ *People's R. Co. v. Spencer*, 156 Pa. 85; *Thompson v. Thompson*, 1 Jones 430; *Thalheimer v. Tischler*, 55 Fla. 796; *London Co. v. Gomm*, 20 Ch. D. 562.

⁵⁶ *In re Adams & K. Vestry*, 24 Ch. D. 199; 27 Ch. D. 394; *Brantly on Contr.* 146. In *Gustin v. Union School Dist.*, 94 Mich. 502, the Court said: "The deceased (option holder) had merely a right to acquire an interest, and at his death nothing descended to his heirs. The lease, however, with the accompanying right to purchase, did pass to his representatives."

⁵⁷ Fry S. P., Sec. 218.

next of kin, to the exclusion of the heir;⁵⁸ and to the exclusion of a devisee of the land, in case the contract was made subsequent to the execution of the will.⁵⁹ In like manner, the vendee, having bound himself to accept conveyance and to pay the price, has worked a similar equitable conversion of the amount of the purchase price to be paid by him, and his heir or devisee can compel the executor to apply the money to purchase the land,⁶⁰ or otherwise for the benefit of the heir or devisee,⁶¹ to the exclusion of the next of kin. An option contract, on the other hand, is a unilateral contract. The option giver is bound to convey, but the option holder is not bound to buy. As should be expected, the result of this is, that the option giver is held to have worked an equitable conversion of his land in case the conditions of the contract are fulfilled. If the option holder fulfils those conditions, subsequent to the death of the option giver, the English courts hold, that the personal representative of the vendor, and not the heir, will get the money.⁶² But the option holder has not bound himself to buy, and has therefore worked no equitable conversion of his personal estate. If he dies without becoming bound, his heir should not profit, for it is not shown that the deceased desired him to profit. The doctrine of equitable conversion rests wholly upon the supposed intention and desire of the deceased, and in this case the deceased expressed no intention. But the deceased had a valid contract right, a chose in action. It is property, and belongs to his estate. But it is personal property and goes to the executor as such.

From the foregoing, it appears that the position of the option giver is almost identical with that of any one who has made a binding contract to convey. This could scarcely be so, if the option were nothing more than an unaccepted offer. In fact, it is nearly always a present contract to convey on condition, and should be so treated.

Some of the American courts hold that the equitable conversion

⁵⁸ *Bubb's Case*, Freeman C. C. 38; 1 *Ames Cases Eq.*, 194.

⁵⁹ *Mayer v. Gowland*, 2 Dickens 563.

⁶⁰ *Milner v. Mills*, Moseley, 123; 1 *Ames Eq. Cas.*, 191; *Daire v. Beversham*, Nelson 76; 1 *Ames* 192.

⁶¹ *Matthews v. Gadd*, 2 South Australia L. R. 129; 1 *Ames* 193.

⁶² *Lawes v. Bennett*, 1 Cox 167; *Townley v. Bedwell*, 14 Ves. 591; 1 *Ames* 199.

of the option giver's land does not take place until notice of acceptance by the option holder.⁶³ Possibly these decisions can be justified on the ground that no conversion should be held to take place in the case of any conditional contract to convey, until the fulfilment of the condition.

If the premises are destroyed by fire, before the option holder has fulfilled the condition, by giving notice or otherwise, it has been held that the option holder is entitled to the insurance if he fulfils the condition later.⁶⁴

In England it has been held, that an option on land for an indefinite time is obnoxious to the rule against perpetuities.⁶⁵

TIME IS OF THE ESSENCE.

In option contracts time is nearly always of the essence.⁶⁶ This would be so on either theory of an option. If we regard it as an offer, it is open for a time limited and no offer can be accepted after its lapse.⁶⁷ If we regard it as a conditional contract, it contains the express condition that notice shall be given or that money shall be paid by a specified time. Such an express condition should be enforced according to its terms, unless such enforcement will result in an inequitable forfeiture. In these cases there is no such forfeiture; the option holder has received full value for the consideration he paid for the option itself, and he has as yet paid nothing on the contract of sale. He is in *statu quo*.

There may be more than one act, the performance of which by

⁶³ *Smith v. Loewenstein*, 50 Ohio St. 346; *Rockland-R. Lime Co. v. Leary*, 203 N. Y. 469.

⁶⁴ *Williams v. Lilley*, 67 Conn. 50; *People's Street R. Co. v. Spencer*, 156 Pa. 85. *Contra*, *Edwards v. West*, 7 Ch. D. 858; *Gilbert v. Port*, 28 Ohio St. 276. Of course, the option contract may itself show which party is beneficiary. *Allyn v. Allyn*, 154 Mass. 570.

⁶⁵ *London Co. v. Gomm*, 20 Ch. D. 562, overruling on this point *Birmingham Co. v. Cartwright*, 11 Ch. D. 432; but see *Muller v. Trafford*, (1901) 1 Ch. 54; *Manchester Ship Canal Co. v. Manchester R. Co.*, (1901) 2 Ch. 37.

⁶⁶ *Barrel v. Sabine*, 1 Vernon, 268; *Dibbins v. Dibbins*, (1896) 2 Ch. 348; *Campbell v. London Co.*, 5 Hare, 519, 529; *Potts v. Whitehead*, 20 N. J. Eq. 55; *Maughlin v. Perry*, 35 Md. 352; *White v. Hanford Bank*, 148 Cal. 552; *Neill v. Hitchman*, 201 Pa. 207; *Kemp v. Humphreys*, 13 Ill. 573; *Longfellow v. Moore*, 102 Ill. 289; *Harding v. Gibbs*, 125 Ill. 85; *Watson v. Coast*, 35 W. Va. 463. But a condition that rent shall have been "duly" paid does not mean "punctually". *Starkey v. Barton*, (1909) 1 Ch. 284.

⁶⁷ *Haughwout v. Boisauvin*, 18 N. J. Eq. 318.

the exact time specified is a condition precedent. Frequently the option giver promises to convey if the option holder shall give notice of his election by a fixed time, and shall pay the price within another fixed time thereafter.⁶⁸ In *Ranelagh v. Melton*,⁶⁹ a lease provided that "in case the lessees shall give three months notice to the lessor and shall, at the expiration of such notice, pay unto him the sum of £210 * * * the lessor will convey." The money was not tendered until ten days after the expiration of the three months notice, and the court refused to compel the lessor to convey. This decision is correct because payment by a day certain was an express condition precedent. The court should not disregard it, and hold the defendant on a promise with a different condition, unless the plaintiff is about to suffer an unreasonable forfeiture. Here it is not so. The reason given by the court, however, was that the relation of vendor and purchaser did not exist until actual payment, regarding the option as being the offer of a promise for an act, as in class II herein. This analysis seems to be incorrect, even though the decision is sound. The contract should be regarded as a conditional contract to sell, dating from the time the lease was executed, the consideration being the covenant to pay rent.

If the condition is only that notice shall be given within a certain time, and no time is specified for the making of payment, a delay in paying is not fatal to the option holder.⁷⁰ Of course, if the option specifies no particular time for either notice or payment, time is not of the essence.⁷¹

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⁶⁸ *Ranelagh v. Melton*, 2 Dr. & Sm. 278; 10 Jur. N. S. 1141; *Rockland-R. Lime Co. v. Leary*, 203 N. Y. 469. There may also be other conditions precedent, e. g., appraisal, *Woodruff v. Woodruff*, 44 N. J. Eq. 349.

⁶⁹ 2 Dr. & Sm. 278; 10 Jur. N. S. 1141.

⁷⁰ *Pegg v. Wisden*, 16 Beav. 239; *Nicholson v. Smith*, 22 Ch. D. 460; *Friary Breweries v. Singleton*, (1899) 1 Ch. 86; 2 Ch. 261; *Maughlin v. Perry*, 35 Md. 352.

⁷¹ *Moss v. Barton*, L. R. 1 Eq. Cas. 474. (A three-year lease with option for a renewal for 5, 7, 14, or 21 years from expiration. Lessee continued to occupy, but gave no notice until four years after expiration of first lease. Specific performance decreed.) *Buckland v. Papillon*, L. R. 2 Ch. App. 67; 1 Eq. Cas. 477; *Hersey v. Giblett*, 18 Beav. 174; *Byers v. Denver C. R. Co.*, 13 Colo. 552.

A reasonable time will be allowed. *Larmon v. Jordan*, 56 Ill. 204; *Stone v. Harmon*, 31 Minn. 512; *Fitzpatrick v. Woodruff*, 96 N. Y. 565.